

BEST AVAILABLE

APPENDIX A

**UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT**

No. 85-7437

**WILLIAM T. ERWIN, SR., AND EMELY ERWIN,
PLAINTIFFS-APPELLANTS,**

v.

**RODNEY P. WESTFALL; OSBORN RUTLEDGE;
WILLIAM BELL; ET AL., DEFENDANTS-APPELLEES.**

Appeal from the United States District Court for the
Northern District of Alabama.

[Filed Apr. 8, 1986]

Before JOHNSON and HATCHETT, Circuit Judges, and
MURPHY*, District Judge.

PER CURIAM:

This case presents an appeal from the district court's grant of summary judgment on immunity grounds to defendants in a tort suit by a federal employee against co-employees and supervisors. Since summary judgment was granted on the basis of law that has recently changed in this Circuit, we REVERSE and REMAND for reconsideration.

Plaintiff-appellant William T. Erwin, Sr., a warehouseman at the Anniston Army Depot in Anniston, Alabama, was injured on February 9, 1984, by workplace exposure to toxic soda ash. Some of the ash, which was stored in appellant's warehouse, had spilled from its containers. Erwin inhaled a quan-

*Honorable Harold L. Murphy, U.S. District Judge for the Northern District of Georgia, sitting by designation.

ity of the ash, allegedly suffering chemical burns to his eyes and throat, permanent injury to his vocal cords, and emotional and mental distress. His co-plaintiff and wife, Emely Erwin, suffered a loss of his consortium.

Charging that his injuries were proximately caused by the negligence of certain co-employees and supervisors, Erwin brought suit in Jefferson County Circuit Court on February 7, 1985. The action was removed to the United States District Court for the Northern District of Alabama on March 25, 1985. That court granted summary judgment to defendants-appellees on June 5, 1985, on the ground that the latter were immune from suit as a matter of law since they were federal employees acting within the scope of their duties when the complained-of negligence occurred.

The district court based its ruling on *Johns v. Pettibone Corp.*, 755 F.2d 1484 (11th Cir.1985) (per curiam). *Pettibone* held that " 'absent an allegation of a tort of constitutional magnitude, federal officials are entitled to absolute immunity for ordinary torts committed within the scope of their jobs.' " *Id.* at 1486 (citations omitted).

Conclusions of law rendered by means of a summary judgment are subject to the same standard of appellate review as any other question of law raised on appeal. *Morrison v. Washington County, Ala.*, 700 F.2d 678, 682 (11th Cir.1983). At the time summary judgment was granted, the district court was correct in ruling as it did under *Pettibone*. However, the opinion relied on by the district court was subsequently withdrawn. A revised opinion appeared at *Johns v. Pettibone*, 769 F.2d 724 (11th Cir.1985) (*Pettibone II*). And portions of that opinion in turn were recently deleted on rehearing in *Johns v. Pettibone*, No. 84-7361, slip op. (11th Cir. Nov. 12, 1985) (per curiam) (*Pettibone III*). By the latter order, this Court also denied a petition for rehearing *en banc*.

Pettibone III establishes that the rule that "a government employee enjoys immunity only if the challenged conduct is a discretionary act and is within the outer perimeter of the

actor's line of duty." *Pettibone III*, slip op. at 527 [769 F.2d at 728]. Thus, in granting summary judgment the district court erred as a matter of law in applying only one part of the immunity test — whether the act was in the scope of the employees' duties — without determining whether the challenged conduct was or was not discretionary.

Appellants' efforts to persuade us to abandon the *Pettibone III* rule are unavailing. It is the law of this Circuit. Plaintiffs have alleged undisputed facts sufficient to create a material question of whether or not defendants' complained-of acts were discretionary. Summary judgment was thus inappropriate.

Accordingly, we REVERSE and REMAND for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CV85-H-874-S

WILLIAM T. ERWIN, SR., AND EMELY ERWIN, PLAINTIFFS,

v.

RODNEY P. WESTFALL; OSBORN RUTLEDGE;
WILLIAM BELL; ET AL.; DEFENDANTS.

[Filed June 5, 1985]

MEMORANDUM OF OPINION

Plaintiffs commenced this action in state court against the three named defendants and a variety of fictitious defendants seeking to recover for injuries allegedly inflicted upon plaintiff William T. Erwin, Sr. at his work place while an employee of the United States Government at the Anniston Army Depot. The three named defendants are alleged to be co-employees and/or supervisors. Defendant Westfall timely removed the entire action to this court and all three defendants have now filed a motion to dismiss, or in the alternative for summary judgment. Plaintiffs have filed an objection to the removal and to the dismissal, which objection the court treats as a motion to remand to the state court.

The motions came on for hearing at a scheduled motion docket held May 10, 1985. At the conclusion of the hearing counsel for plaintiffs requested the opportunity to submit a

brief on the issues embodied in the motions. The court gave counsel two weeks, which period at the request of counsel was twice extended, with the final deadline for briefs being June 3, 1985. The motions are now ripe for a decision thereon.

The motion for summary judgment is supported by affidavit and points out that the three named defendants were employees of the United States acting under color of their office and within the scope of their official duties at the time of the acts or omissions made the basis of the ordinary tort claims which are stated in the complaint. The affidavit of plaintiff William T. Erwin does not traverse the fact that the alleged tort was committed within the scope of defendants' jobs. Indeed, the Erwin affidavit almost admits that the acts or omissions of defendants took place at the work site of defendants and within the scope of their jobs. These three defendants are therefore absolutely immune from suit on account of the matters alleged in the complaint and the motion for summary judgment as to them will be granted by separate order. *Johns v. Pettibone Corp.*, 755 F.2d 1484 (11th Cir. 1985). Plaintiffs seek to avoid the effect of the holding in *Pettibone* by observing that *Pettibone* does not discuss discretionary, non-discretionary and ministerial functions. No such discussion was necessary. The law of the Eleventh Circuit is clear that absent an allegation of a tort of constitutional magnitude, any federal employee is entitled to absolute immunity for ordinary torts committed within the scope of their jobs. *Evans v. Wright*, 582 F.2d 20 (5th Cir. 1978).

Plaintiffs included in the complaint a variety of fictitious defendants and as to them the court will remand this action to the state court. The remand will be without prejudice to any defendant substituted for a fictitious defendant hereafter served removing the action to this court. In this regard, the court notes that it is entirely likely that any defendant substituted for fictitious defendants No. 1 and No. 2 (and possibly other fictitious defendants) will also be immune as employees of the government acting within the scope or [sic] their official duties.

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DONE this 5th day of June, 1985.

/s/ JAMES H. HANCOCK

UNITED STATES DISTRICT JUDGE

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

CV85-H-874-S

WILLIAM T. ERWIN, SR., AND EMELY ERWIN, PLAINTIFFS,

v.

**RODNEY P. WESTFALL; OSBORN RUTLEDGE;
WILLIAM BELL; ET AL.; DEFENDANTS.**

[Filed June 5, 1985]

ORDER

In accordance with the Memorandum of Decision this day entered, it is

ORDERED, ADJUDGED and DECREED that the motion of defendants Rodney P. Westfall, Osborn Rutledge and William Bell for summary judgment in their favor is GRANTED and they are DISMISSED as defendants, with prejudice.

The claims of plaintiffs against all fictitious defendants are REMANDED to the Circuit Court of Jefferson County, Alabama, from whence they were removed. The clerk of court is directed to send a copy of this order to the clerk of such state court.

DONE this 5th day of June, 1985.

/s/ JAMES H. HANCOCK

UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-7437

D.C. Docket No. 85-0874

WILLIAM T. ERWIN, SR., AND EMELY ERWIN,
PLAINTIFFS-APPELLANTS,

v.

RODNEY P. WESTFALL, OSBORN RUTLEDGE,
WILLIAM BELL, ET AL., DEFENDANTS-APPELLEES.

Appeal from the United States District Court for
the Northern District of Alabama

Before JOHNSON and HATCHETT, Circuit Judges, and
MURPHY*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

*Honorable Harold L. Murphy, U.S. District Judge for the Northern District of Georgia, sitting by designation.

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

Entered: April 8, 1986

For the Court:

Spencer D. Mercer, Clerk

By: /s/ AARON A. GODFREY

Deputy Clerk

APPENDIX E

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 85-7437

WILLIAM T. ERWIN, SR., AND EMELY ERWIN,
PLAINTIFFS-APPELLANTS,

v.

RODNEY P. WESTFALL; OSBORN RUTLEDGE;
WILLIAM BELL; ET AL.; DEFENDANTS-APPELLEES.

Appeal from the United States District Court for
the Northern District of Alabama

[Filed June 2, 1986]

*ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC* (Opinion APRIL 8, 1986, 11
Cir., 198____, ____ F.2d ____). (JUNE 2, 1986)

Before JOHNSON and HATCHETT, Circuit Judges, and
MURPHY*, U.S. District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member
of this panel nor other Judge in regular active service on
the Court having requested that the Court be polled on rehear-
ing *en banc* (Rule 35, Federal Rules of Appellate Procedure;
Eleventh Circuit Rule 26), the Suggestion for Rehearing *En
Banc* is DENIED.

*Honorable Harold L. Murphy, U.S. District Judge for the Northern
District of Georgia, sitting by designation.

() The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

() A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ FRANK M. JOHNSON JR.

United States Circuit Judge